# ENGLISH CASES ON THE RESTRAINT OF LIBEL BY INJUNCTION SINCE THE SUPREME COURT JUDICATURE ACT, 1873.

In 1854 the Parliament of Great Britain passed an act, known as the Common Law Procedure Act, 1854, for enlarging the jurisdiction of the courts of common law.[1] This act enabled anyone who sued for the breach of a contract or other injury to claim a "writ of injunction against the repetition or continuance of such breach of contract or other injury."[2] It also enabled the plaintiff in any such action to apply *ex parte* for an injunction to restrain the repetition of the act complained of, either before or after judgment, and provided that the court had a right to issue such injunction on such terms as appeared "reasonable and just."[3] This statute appears to give jurisdiction to the common law courts to issue a permanent or interlocutory injunction to restrain a tort, where an action for damages for such tort has been instituted, the permanent injunction to be given only after judgment in favor of the plaintiff. As far as the writer is aware no case involving an application to a court of common law for the restraint of a libel arose subsequent to the passage of this act, and before the Judicature Act of 1873.[4] This last act created a Supreme Court, with two permanent divisions, the High Court of Justice and the Court of Appeals,[5] and vested in the High Court of Justice the jurisdiction which, prior to the act, had existed in many courts of original jurisdiction, among others the courts of common law at Westminster, and the High Court of Chancery.[6] The jurisdiction to issue injunctions to restrain tort which had been vested in the courts of common law by the Common Law Procedure Act, 1854, and the jurisdiction of Chancery over the same subject was thus vested in the High Court of Justice. Furthermore the Judicature Act expressly gives the court power to grant an injunction "by an interlocutory order in all cases in which

[1] Stats. at Large, 17 and 18 Vict., Ch. 125. [2] Section 79. [3] Section 82.
[4] L. R., Stats. 1873, 36 and 37 Vict., Ch. 66. [5] Section 5. [6] Section 16.

it shall appear to the court to be just or convenient that such an order should be made; and any such order may be made either unconditionally or upon such terms and conditions as the court shall think just."[7] It will be noticed that this clause speaks only of interlocutory injunctions.

The object of this paper is to ascertain how far under the acts mentioned the English High Court of Justice has the right to restrain by injunction the publication of a libel, and if the court has this power, what are the principles, if any, which guide the court in exercising the jurisdiction?

The first libel case to arise after the passage of the Judicature Act was *Thorley's Cattle Food Company* v. *Massam*.[8] This was an application before Vice-Chancellor Malins for an interim injunction to restrain the defendant from publishing a statement to the effect that the defendant was alone possessed of the secret of compounding a certain well-known cattle food. As the vice-chancellor had just decided that the plaintiffs also were possessed of the secret,[9] there was no doubt in his mind that the statement sought to be restrained was false. Counsel for the plaintiff contended that if, prior to the Judicature Act he could not have obtained the injunction, the twenty-fifth section of that act had given power to the court to issue the injunction in all cases where it was "just and convenient."[10] The vice-chancellor was inclined to think, that upon the proper construction of the section, whenever the court sees that an injunction ought to be granted, it may be granted.[11] As he believed the injunction in the case before him, in view of a recent decision, should not be granted except for the Judicature Act, he regarded the question of whether it can now be granted in view of that act as of too great importance to be decided on an interlocutory application.[12] It will be noticed that by refusing to decide the matter on interlocutory motion he impliedly

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[7] Section 25, Clause 8. [8] L. R. 6 Ch. D. 582, 1877.

[9] See *Massam* v. *Thorley's Cattle Food Company*, 6 Ch. D. 574, 1877.

[10] Page 585. [11] Page 590.

[12] The recent case to which he referred was *Prudential Assurance Company* v. *Knott*, L. R. 10 Ch. 142, 1875, in which his own opinion in *Dixon* v. *Holden*, 4 L. R. 7 Eq. 488, 1869, that a libelous writing injurious to property can be restrained was severely criticised.

takes the position that the twenty-fifth section of the Judicature Act may be considered as applying to final as well as interlocutory injunctions. He also intimates in the opinion referred to, his belief that the twenty-fifth section of the Judicature Act has indefinitely extended the power of the court to restrain wrong conduct by injunction. It will also be noticed that he in nowise refers to the Common Law Procedure Act, 1854, as increasing his power to issue the injunction asked for.[13]

In *Beddow* v. *Beddow*.[14] Sir George Jessel discussed the relation between the act, 1854, and the Judicature Act. It was not a case involving the restraint of libel. It was a motion for an injunction to restrain the defendant from acting as a referee or arbitrator under the provisions of an agreement. Counsel for the defendant contended that a court of chancery had no power to remove an arbitrator because he was indebted to one of the parties. The master of the rolls impliedly admitted this; but he maintained his jurisdiction. He first pointed out that the Act of 1854 conferred on the common law courts, in cases where actions had been brought at law, a much wider power to issue injunctions than that assumed by the Court of Chancery. The latter was limited by the practice of different chancellors, but by the Act of 1854 the only limit spoken of in the eightieth section, the section which confers the right to issue interim injunctions, is that the injunction shall appear to the court to be reasonable and just. This wider jurisdiction has been conferred by the Judicature Act on the High Court of Justice. He seems to imply—indeed it is a necessary inference—that had it not been for the twenty-fifth section of the Judicature Act, this wider power would have been confined as it was in the Common Law Procedure Act, to cases in which an action for damages had been instituted, and he shows that the twenty-fifth section of the act extends the power to all cases where an injunction is just or convenient, and that these words in the Judicature Act are rendered clear by a reference to the Act of 1854. He further

[13] For the ultimate disposition of the controversy between the two rival cattle food companies see *infra*, note 20.

[14] L. R. 9 Ch. D. 89, 1878.

points out, that though the twenty-fifth section speaks only of interlocutory orders, it is a necessary implication that what can be done on an interlocutory application can be done in the trial of the action. He concludes with this sweeping declaration: "In my opinion, having regard to these two acts of Parliament, I have unlimited power to grant an injunction in any case where it would be right or just to do so."[15] He, however, adds these significant words: ". . . what is just or right must be decided, not by the caprice of the judge, but according to sufficient legal reasons or on settled legal principles."[16]

Sir George Jessel in the case just discussed had claimed a wide extension of the powers of the court to issue injunctions as a result of the Judicature Act. In the same year, in *Saxby* v. *Easterbrook*,[17] Chief Justice Coleridge and Lindley, J., maintained a doctrine which, irrespective of the Judicature Act gave to the court a power, not heretofore claimed, except by Vice-Chancellor Malins, to restrain, under certain circumstances, the publication of a libel. The plaintiff had brought an action for damages for the publication by the defendant of the statement that the plaintiff was not the first inventor of a certain patent. At the trial before Lord Coleridge the jury adjudged the publication libellous, and the judge then issued a permanent injunction restraining the defendant from publishing similar libels against the plaintiff. A doubt having arisen as to the power of a judge at *nisi prius* to order an injunction, the motion for the injunction was renewed and heard by a divisional court, which after argument confirmed the order. Both judges regarded the question before them as identical with that which would have arisen, if, prior to the Judicature Act, an application had been made to Chancery to restrain a publication injuri-

[15] Page 93. In the case before him he granted the injunction.

[16] It is of course improper to issue the injunction where the defendant is not violating any legal right of the plaintiff. See *Day* v. *Brownrigg*, L. R. 10 Ch. D. 294, 1878, 307, where the court refused to restrain the defendant from adopting for his country place the same name as that used for many years by the plaintiff, his neighbor, to designate his place. The court believed the defendant had a right to call his place by any name he wanted to.

[17] L. R. 3 C. P. D. 339, 1878.

ous to the plaintiff's business and which had been determined by a jury to have been libellous. The reason for regarding the question before them in this light is not stated. They must have considered that the Common Law Procedure Act conferred on the Common Law Courts, only the then existing jurisdiction of equity over torts, where an action for the tort had been brought, and therefore that the Judicature Act, in conferring on the High Court of Justice the jurisdiction of the Common Law Courts, did not confer any greater equitable jurisdiction over torts than was conferred by vesting in the court the existing jurisdiction of the High Court of Chancery. From this point of view the Judicature Act merely enabled the remedy by injunction and by damages to be obtained in a single action. It will be noted that this conclusion as to the extent of the power to issue injunctions conferred by the Common Law Procedure Act is directly contrary to that of Sir George Jessel. Lord Coleridge also states that he does not see what the twenty-fifth section of the Judicature Act has to do with the question; thus making the assumption that this section only confers power to issue interim injunctions, an assumption which is again in opposition to the opinion of the Master of the Rolls.[18]

Regarding the question before them, as whether, irrespective of any statute, a court of equity has jurisdiction to restrain a writing which a jury has declared to be libellous, they take the position, that the reason why the court of equity ordinarily refuses to restrain the publication of a writing, is because since Fox's Act the question of libel or no libel is peculiarly one for the jury, but where a jury has determined this question, there is no reason why an injunction should not issue. They admit that no cases in equity have gone so far; but they also point out that in all the

[18] Lord Coleridge had no doubt but that the 25th section of the Judicature Act greatly extended the power of the court to issue injunctions on interlocutory application. See his opinion the following year in *Shaw* v. *Earl of Jersey*, L. R. 4 C. P. D. 120, 1879, 123, 124, where he restrained a landlord from distraining on his tenant, the tenant having asserted that the right of distress was unjustly claimed, though the Judge admitted that he would have had on power to do so except under this section of the Act.

cases in equity in which the injunction had been refused, the application had been made before the nature of the writing sought to be restrained had been determined by a jury. The weakness of this argument from an historical point of view is that Fox's Act applies only to criminal libels,[19] and that prior to the passage of this act the Court of Equity did not restrain the publication of writings. This would indicate that the origin of the reluctance of the chancellors to restrain libels was in the feeling of the public in regard to the liberty of the press, and that the desire to have the question of libel or no libel in criminal cases determined by a jury, was merely another effect of this feeling.

The idea of Lord Coleridge and Mr. Justice Lindley, that any court of equity has the right to restrain a libel after the same has been passed on by a jury, seems to have met the approval of at least two other Judges. Vice-Chancellor Malins, when the case of *Thorley's Cattle Food Company* v. *Massam* came before him for final disposition,[20] for the purpose "of bringing the case within the decisions" assessed the damages as a jury at forty shillings and then granted a permanent injunction against a republication of the statement of which the plaintiff complained.[21] The Court of Appeal confirmed this injunction.[22] Sir Edward Fry refers to the principle stated in *Saxby* v. *Easterbrook,* in *Thomas* v. *Williams,*[23] with apparent approval. He also, however, takes the position that the Judicature Act

[19] 37 Stats. at Large, Ch. 60, 32 Geo. III.

[20] L. R. 14 Ch. D. 763, 1880. [21] Page 781.

[22] James, L. J., Baggallay, L. J., and Bramwell, L. J., were the members of the court. There is no discussion as to the origin of the jurisdiction to issue a permanent injunction. The counsel for the defendant argued that the question of libel had not been tried by jury as required by *Saxby* v. *Easterbrook*. The members of the court do not discuss this argument. It would appear that at this time the defendant had a right before the case was tried to demand a jury trial; see Judicature Act, 1873, Sch. 31, and Judicature Act, 1875, Order xxxvi, Sec. 3. The absolute right to a jury trial seems to have existed until 1883, when by the Rules of the Supreme Court of that year, made under Sections 16, 17 of the Judicature Act, 1875, giving the court power to alter the rules in the schedule of the act, actions begun in the Chancery Division may be tried by jury *if the judge so directs*. [23] L. R. 14 Ch. D. 864, 1880, 874.

was intended to enlarge the power of the court in respect to injunctions.[24] In the case before him, the injunction would have been issued irrespective of any question arising under the act, or of the jurisdiction of equity to restrain libels, as the writing restrained falsely represented the goods of the defendent as the goods of the plaintiff.

As far as the writer is aware, in only two other cases have the English courts issued permanent injunctions to restrain libels and in neither are the grounds of the jurisdiction discussed. In *Hill* v. *Davies*,[25] Kay, J., issued an injunction to restrain the defendant from issuing a circular to persons not members of the Friendly Society of which the plaintiffs were trustees, reflecting on the financial standing of the society, "or any other circular or letter containing false or inaccurate representation, as to the credit or the financial condition of the said society." The judge believed the statements heretofore made to be untrue in fact. The words quoted were added to the order by the court. Their propriety may be considered more than doubtful. To restrain a man from repeating a statement found on investigation to be libellous is one thing; but to prohibit a man generally from making false statements about another is a most indefinite variety of blanket order.[26] In the comparatively recent case of *Pink* v. *Federation of Trades and Labour Unions*,[27] the court continued at the trial and made perpetual an injunction previously granted on interlocutory application to restrain the defendant from publishing a statement to the effect that the plaintiff had persistently boycotted five lightermen for belonging to a union, a statement which the court not only thought false, but injurious to the plaintiff.

It would thus seem to be beyond question that the English courts have power to issue an injunction to restrain a writing which after trial has been ascertained to be libellous, and that they will freely exercise the right. It would seem also immaterial whether the action was begun in the Chancery or in the Common Pleas Division of the High Court of

[24] Page 873. [25] L. R. 21 Ch. D. 798, 1882.

[26] The order will be found on page 802.

[27] 67 L. T. Rep., n. s. 258, 1892.

Justice, as two of the cases above cited were begun in the Chancery Division. Under the present rules making a jury trial, where the action has been begun in the Chancery Division, optional with the judge,[28] it is not necessary that the question of libel or no libel shall have been determined by a jury, or that the defendant shall have had a right to a jury trial. It may be that the profession in England agree with the late Lord Coleridge and with Lord Lindley, that any court having equity powers has the right to restrain a libel after verdict; but the United States, not England, is the country where this question has any live interest. For in England, the cases which we are about to discuss on interlocutory injunctions to restrain libel, have, as we shall see, confirmed the opinion of Sir George Jessel, that the Judicature Act gives the High Court of Justice a power to issue injunctions only limited by such rules as the courts themselves see fit to set.

These cases on interim injunctions to restrain libels begin with the case of the *Quartz Hill Consolidated Gold Mining Company* v. *Beall*.[29] A solicitor, acting for some of the shareholders of a company, sent out to the other shareholders a circular reflecting on the way in which the company was conducted. An action was commenced by the company and an interlocutory injunction applied for, which was granted by Vice-Chancellor Bacon. The Court of Appeal per Jessel, Baggallay and Lindley, L. JJ., discharged the injunction. They did so, however, not because they doubted the power of the court to restrain a libel on interlocutory application, but because they did not believe that this was a proper case for the exercise of the power. Sir George Jessel repeats his position on the question of jurisdiction taken in *Beddow* v. *Beddow*.[30] His point of view is adopted by Sir Richard Baggallay, who also expressly points out that the Common Law Procedure Act gave much wider power to issue injunctions than the customary jurisdiction of the Court of Chancery.[31] As far as the writer is

[28] See Note 22 *supra*. [29] L. R. 20 Ch. D. 501, 1882.

[30] See *supra*, note 14.

[31] Lindley, L. J., contents himself in supporting the jurisdiction by a reference to *Thomas* v. *Williams*, and *Beddow* v. *Beddow*.

aware, since this decision no one has questioned the power of the court under the Judiciary Act to grant an interim injunction to restrain a libel. The power has been repeatedly asserted.[32]

But it is one thing to have the power, another to exercise it. In *Quartz Hill Consolidated Gold Mining Company* v. *Beall,* as we have seen, the Court of Appeal declared that the facts did not warrant an interlocutory injunction. By pointing out three objections to the injunction the Master of the Rolls indicated that there were at least three requisites for such an injunction. He said that it was not shown that the alleged libel was untrue, or that the defendant intended to repeat the publication; but that, more important than all, the publication on its face was of the nature of a privileged communication issued by one shareholder to his brother shareholders. In *Loog* v. *Bean,*[33] on the other hand, an injunction granted on interlocutory application was confirmed in the Court of Appeal. The case was one of slander, not libel, but as the court points out the same principles in regard to injunctions to restrain apply. The defendant, who had been employed in the sale of sewing machines, was dismissed by the plaintiffs. He then began to go to the persons to whom he had sold machines for the plaintiffs and make slanderous statements about them. To one he declared that the machine sold was worthless; another he warned not to pay the plaintiffs, as they had cheated him; to a third he stated that the plaintiffs were insolvent. The court believed that these statements were untrue, malicious and injurious to the plaintiffs. It may also be pointed out that there could not have been any doubt in regard to the slanderous character of the statements themselves, admitting that they were untrue. The case unquestionably satisfies all the requisites for an interlocutory injunction to restrain a libel

[32] *Armstrong* v. *Armit*, 2 Times L. R. 887, 1886; *Coulson* v. *Coulson*, 3 Times L. R. 846, 1887; *Liverpool Household Stores Asso.* v. *Smith*, L. R. 37 Ch. D. 170, 1887, 175, 183; *Bonnard* v. *Perryman* (1891), 2 Ch. 269, 275, 283, 285; *Collard* v. *Marshall* (1892), 1 Ch. 571, 577; *Pink* v. *Federation of Trades and Labour Unions*, 67 L. T., n. s. 258, 1892, 259; *Monson* v. *Tussauds* (1894), 1 Q. B. 671, 689, 692.

[33] L. R. 26 Ch. D. 306, 1884.

as suggested by Sir George Jessel in *Quartz Hill Consolidated Gold Mining Company* v. *Beall.*

The cases of *Armstrong* v. *Armit*[34] and *Coulson* v. *Coulson,*[35] besides suggesting additional circumstances which must be present before an alleged libel will be restrained on interlocutory motion, illustrate the strong reluctance of the court to grant such injunctions. In the former case, which came before the court on a motion to restrain the defendants from publishing a statement that the plaintiffs had obtained government contracts by means of corrupt influences, Lord Coleridge, in his opinion advocating that the motion should be dismissed, lays emphasis on the fact that the plaintiffs had not shown that the continued publication of the statement would do them irreparable damage.[36] In *Coulson* v. *Coulson,* the Court of Appeal dismissed the interim injunction granted by the court below because they felt they were not in possession of sufficient facts. Lord Esher, in the course of his opinion, stated certain criteria for the issuing of these injunctions. His statements have had considerable influence on the practice of the English courts. Referring to the fact, that, though Fox's Act had reference only to criminal cases, since its passage it had always been considered that the question of libel or no libel was for the jury, he says: "To justify the court in granting an interim injunction, it must come to a decision upon the question of libel or no libel, before the jury decided whether it was a libel or not. Therefore the jurisdiction was of a delicate nature. It ought only to be exercised in the clearest cases, where any jury would say that the matter complained of was libellous, and where if the jury did not so find, the court would set aside the verdict as unreasonable. The court must also be satisfied that the alleged libel is untrue, and if written on a privileged occasion that there was malice on the part of the defendant."[37]

No one will care to question his own conclusion that, "It followed from these rules that the court could only on

[34] 2 Times L. R. 887, 1886. [35] 3 Times L. R. 846, 1887.

[36] Page 890. Denman, J., concurred. The motion was dismissed. A decision of the Queen's Bench Division. Lord Coleridge also thought that the statement was probably privileged. [37] Page 846.

the rarest occasions exercise their jurisdiction." The ideas of Lord Esher were followed in *Liverpool Household Stores Association* v. *Smith*,[38] where the Chancery Division and the Court of Appeal refused to restrain the defendant on interlocutory motion from publishing any letters reflecting on the financial standing of the plaintiff association, though the assertions were probably untrue. The test in *Coulson* v. *Coulson* was referred to, and it was pertinently asked, ". . . how can the court judge whether documents, which are not yet in existence, will be libellous?"[39] If the court will not issue the injunction, unless on reading the statement desired to be restrained they have no doubt of its libellous character, it necessarily follows that they will not restrain a non-existing document.[40]. The case of *Bonnard* v. *Perryman*[41] introduces a further limitation. The defendant was the publisher of a weekly financial newspaper. The plaintiffs traded as the Mercantile and General Trust. The defendant published a violent attack on the plaintiffs, reflecting on their financial standing and their integrity, among other things speaking of their place of business as a "Jew's den," asserting that they had bought the furniture of their offices with borrowed money, and that they associated with one Marks, a person elsewhere described by the defendant as guilty of all the crimes in the criminal code. In the Chancery Division an interim injunction was issued by

[38] 37 Ch. D. 170, 1887. [39] Per Cotton, L. J., p. 181.

[40] Kekewich, J., who refused the injunction in this case in the Chancery Division, nevertheless expressed a rule in regard to issuing these injunctions, somewhat more liberal than that pointed out by Lord Esher in *Coulson* v. *Coulson*. After asserting the jurisdiction to restrain a libel on interlocutory motion, he says that the general rule in regard to these interim injunctions is that they should be issued whenever "the Court sees that there is a fair question to be tried, and that there will be irreparable injury unless the injunction issue." He points out that the only difference in the case of alleged libel, and injunctions in other cases, is that to issue the injunction the court must decide the question of the character of the publication, and that they ought to be cautious in doing so "lest it should influence the minds of the jury." He himself doubts the correctness of the assumption that the jury will be influenced; but still regards the assumption as the basis for the court's reluctance to issue interim injunctions in cases of libel. See page 175. [41] (1891) 2 Ch. 269.

North, J. He regarded the case as coming within all the requisites for such an injunction; namely, that the statements were false, sure to be repeated by the defendant unless he was restrained, and not of a privileged character. That if untrue they were libellous was beyond question. The Court of Appeal, however, dissolved the injunction.[42] Lord Coleridge reiterates the principles stated in *Coulson* v. *Coulson,* but he adds an additional requisite. He says: "In the particular case before us, indeed, the libellous character of the publication is beyond dispute, but the effect of it upon the defendant can be finally disposed of only by a jury, and we cannot feel sure that the defence of justification is one which, on the facts which may be before them, the jury may find to be wholly unfounded; nor can we tell what may be the damages recoverable. Moreover, the decision at the hearing may turn upon the question of the general character of the plaintiffs; and this is a point which can rarely be investigated satisfactorily upon affidavit before trial . . "[43] The last sentence just quoted would seem to indicate that in his opinion the statement sought to be restrained contained general allegations concerning character. Though there is no other decision raising the question whether general statements of bad character will be restrained on interlocutory motion, it may be taken for granted that in such cases the court will not issue an interim injunction. The first part of the quotation, however, raises other and more doubtful questions. It may be that Lord Coleridge thought that the facts before him indicated that it was doubtful whether the assertions sought to be restrained were untrue. In that case in refusing the injunction he introduces no new principle, but if he merely believed that the defendant would introduce evidence to show the truth of his statements and on that account refused the injunction, then the sentence above quoted stands for the proposition: That in cases involving character libels, whenever the court believes the jury will be called upon to consider evidence to show that the libel was justified, an interim injunction should not issue.

Again, when he says, "nor can we tell what may be the

[42] Per Coleridge, C. J., Lord Esher, M. R., Lindley, L. J., and Bowen, L. J. Kay, L. J., dissented. [43] Page 284.

damages recoverable," he may merely mean that in the case before him the evidence showed that the defendant would probably be able to prove that the general character of the plaintiffs was so bad that even if they had been libelled they were not injured; but it looks as though he intended to assert the principle, that whenever the court believed that the question of the general character of the plaintiff would come before the jury in mitigation of damages an interim injunction should not issue. It will readily be seen that these two propositions practically take away all power to issue interim injunctions to restrain a libel affecting character, except where the defendant rests his whole case on the contention that the publication is not libellous because it does not impute evil, and the court is clearly of the opinion that it does impute evil and is libellous.

Whether the opinion of Lord Coleridge, as interpreted by the two propositions above given, is or is not shared by the present English judges, they would appear to have nothing to do with trade libels, that is statements in respect to a person's goods. We may also presume that those who agree with *Bonnard* v. *Perryman,* do not object to an interim injunction restraining a statement which injures the person attacked in the minds of particular persons with whom he deals, and consequently affects his sales among that class, but does not injure him in eyes of the average member of the community, and therefore strictly speaking, does not affect his character. We have already mentioned a case belonging to this last class. In *Pink* v. *Federation of Trades and Labour Unions,*[44] Kekewich, J., issued an interim injunction to restrain the publication by the defendant of a statement that the plaintiff had persistently boycotted five workmen for belonging to a union.[45] The statement was being mailed to the secretaries of co-operative societies, the plaintiff having considerable trade among the members of such societies. A case more nearly like *Bonnard* v. *Perryman* is *Collard* v. *Marshall.*[46] Here Chitty, J., issued an interim injunction to restrain the defendant from further pub-

[44] 67 L. T., n. s. 258, 1892.

[45] The case is reported on motion for a permanent injunction, see *supra*, note 27. [46] (1892) 1 Ch. 571.

lishing a circular to the effect that the sweating system was practiced at the plaintiff's works. He distinguished the case from *Bonnard* v. *Perryman* on the ground that the former was a libel affecting general character and the case before him was a trade libel. The distinction between the cases may be doubted. If by trade libel is meant a libel intended to affect and affecting a man's business, then both cases were cases of trade libels. If by trade libel is meant a statement concerning the plaintiff's goods, then neither case is a case of trade libel. To call a man as in *Bonnard* v. *Perryman* an associate of blacklegs, is a statement calculated to injure his standing in the community; but to say that he uses the sweating system, probably does the same thing; though it is true that a particular class of persons, that is laborers, are particularly affected by such statements. The difference between the two cases is one of degree rather than of kind, and as *Bonnard* v. *Perryman* is a decision by the Court of Appeal, *Collard* v. *Marshall* must be regarded as a doubtful case.

The last and in one sense the principal case to discuss these interim injunctions in cases of libel is *Monson* v. *Tussauds*.[47] The plaintiff had been indicted in Scotland for murder. The trial attracted a great deal of attention, and resulted in the Scotch verdict of "not proven." The defendants were the proprietors of an exhibition consisting of wax figures representing famous and infamous persons. They exhibited a wax image of the plaintiff, and in another part of their establishment known as the "Chamber of Horrors," a representation of the scene of the murder; though no representation of the plaintiff appeared. An interim injunction to restrain the exhibit was issued by a Divisional Court. Mathews, J., adopts the principle of *Coulson* v. *Coulson,* and favors the injunction because he believes that the representation is unquestionably libellous.[48] Collins, J., however, repeats the principle of Lord Coleridge, that it must be apparent that the defendant will not justify his act at the trial. He, therefore, only favors the interim injunction because the defendants disavow any intention to justify

[47] (1894) 1 Q. B. 671.

[48] Page 676.

the libel and place their whole case on the assertion that what they have done is not libellous, because the plaintiff is not represented as the murderer.[49]

Between the issuance of the interim injunction by the Divisional Court, and the hearing of the appeal on the interlocutory order, the defendants filed affidavits to the effect that the plaintiff had consented to the representation. The appeal was allowed and the injunction dissolved. The judgment was unanimous, but the members of the court differed as to the grounds of their action. Lord Halsbury would have affirmed the action of the court below had it not been for the additional affidavits. He distinctly repudiates the idea that the injunction should not issue in these cases, unless there is no question for the jury to decide.[50] He admits that the injunction should not issue except in a clear case, but he apparently objects to the rule that the existence of a libel must be so clear that any judge would be justified in setting aside a contrary verdict.[51] The other two judges, on the contrary, uphold Lord Esher's rule, that there must be no shadow of question as to the libellous nature of the publication.[52]

In view of the differences of opinion in the case just discussed, Kekewich, J., in *Throllope* v. *The London Building Trades Federation*[53] said, speaking of the plaintiff's contention, that a publication was a libel and should be restrained: "In my opinion it is convenient, if possible, not to deal with any question of that kind upon interlocutory motion, having regard to the authorities, and more especially to the recent case of *Monson* v. *Tussauds*." This attitude, however, is hardly fair to the cases. The cases do enable us to come to certain definite conclusions. In the first place there is no doubt that under the Judicature Act the jurisdiction exists. Again, in cases where the injury comes from the way in which the wares of the plaintiff are spoken of, the injunc-

[49] Page 680. [50] Page 689. [51] Page 685.

[52] Pages 694, 696, 697. They seem to differ, however, as to the application of the rule to the case on the facts presented to the Divisional Court. Lopes, J., believes that it is not clear that the representation was libelous; while Davey, J., does not distinctly commit himself on this point. See pages 694, 697.

[53] 72 L. T. Rep. 342, 1895, 343.

tion will issue, provided the statement is believed by the judge to be untrue and calculated to do irreparable harm to the plaintiff. So also the injunction will issue where the effect of the statement which the judge believes to be untrue is to affect the sale of the plaintiff's wares, not by injuring his character, but by affecting the prejudices of his customers. It is only in the case of libels affecting character that any doubt should exist in regard to the principles on which the court will act. Even here we find certain rules which we may regard as certain. Statements involving a person's general character will not be restrained. Where, however, the defendant places his whole case on the proposition that the publication is not libellous because it imputes no wrong to the plaintiff, and the court is clearly of a contrary opinion, an interim injunction will issue. The only question of doubt is whether a character libel will ever be restrained where the defendant intends to justify his assertions on the trial. This was doubtful before Tussaud's case and is doubtful yet, with the decided preponderance of judicial opinion against issuing the interim injunction in such a case.[54]

In conclusion, it may properly be asked: Has the experience of England, under the statutes giving jurisdiction to restrain a libel by injunction, been such as to encourage our legislatures to confer on our courts similar powers? The writer believes that this question can without question be answered in the affirmative, at least as far as the power to restrain the repetition of a publication found by a jury to be libellous. The English courts are of the opinion, as we have seen, that an act of the legislature is not necessary to enable a court having equity powers to issue such an injunction. Whether this be so or not, there is no apparent reason why the liberty to speak and write freely should give a person license to continually publish matter which a jury

[54] The fact that a single judge has questioned Lord Esher's view that the publication to be restrained on interim injunction should be so clearly libelous that any judge would set aside a verdict to the contrary as unreasonable, can hardly be said to throw any doubt on a proposition that has been so frequently reiterated, and which was reiterated by the majority in the very case in which Lord Chancellor Halsbury dissented from it.

has declared to be libellous. Where the action is begun not for damages, but for an injunction, the act should not confer jurisdiction on the court of equity to issue a permanent injunction unless the defendant has the right to have the question of libel determined by a jury. The fact that under the English act, and orders, the judge has the right to send such a case to a jury, but is under no obligation to do so, is a defect. There is unquestionably an element of danger to free criticism in permitting a judge to determine the existence of a libel, and having so determined, issue a permanent injunction to restrain it. The jurisdiction to restrain a publication alleged to be libellous by an interim injunction is one, which in the hands of an ill-trained judiciary would be liable to gross abuse. Under the decisions we have discussed, which practically confine the exercise of the jurisdiction to the restraint of libels which have nothing to do with character, the jurisdiction has much to commend it. In fact the way in which the English courts are hammering out from individual instances the principles which should guide them in exercising the right to restrain libels, on interlocutory motion, is a vindication of the assertion, that it is no argument against a jurisdiction, which in some cases can be exercised beneficially, to say that it might be used so as to unduly interfere with personal liberty.[55]

*William Draper Lewis.*

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[55] I have purposely omitted any discussion of the case of *Throllope* v. *The London Building Trades Federation*, 72 L. T. Rep. 342, 1895, 343, because, though an interim injunction was there issued to restrain a publication, the publication was not libelous, and Kekewich, J., who issued the injunction, distinctly stated that he did not issue the injunction under any jurisdiction to restrain a libel. The case itself, though scantily considered in the Court of Appeal, suggests questions of considerable interest. A strike had been declared by the union at the plaintiff's works. Some of the plaintiff's men had remained at work. The defendants published a poster with a black edge, headed "Throppe's Black List," containing the names of the non-union workmen in the employ of the firm. The designation "Black List" meant a list of men who were not in sympathy with acts of the union. There was no allegation that the inference to be drawn from the words was untrue. The writing therefore was not libelous. Kekewich, J., issued the injunction on the ground that the publication was a purely malicious act, having for its ultimate object the injury

of the plaintiff. He intimates that had it been for the benefit of the members of the union it might have been lawful. This idea makes the lawfulness or unlawfulness of the publication depend on the motive of the defendants, a theory repudiated by the House of Lords in *Allen* v. *Flood* (1898), A. C. 1. To the writer there appears to be two ways in which a publication can injure another. The publication may injure because it produces in the minds of those who read it the idea that the person spoken of is not in some respect or other a proper person. The injury due to libel is an injury of this character. But to make a person who has published a statement derogatory to the character of another civilly liable for the injury he has done, it is necessary that the statement in the publication should be untrue. Where a written statement injures a person solely because it lowers the estimation in which he is held, to recover for the injury the injured person must bring his case within the principles of civil liability for libel.

The second way in which a publication may injure another is by inducing in the reader or readers a course of action inimical to the person spoken of. For instance, B in a letter to C may urge C not to deal with A, though nothing in any way affecting A's character may be said. If C in consequence refused to deal with A, A would be injured by the letter, though of course B would not be liable for this injury. B may induce C to break his contract with A either by argument or by threats of business or physical harm, and again the vehicle of the argument or the threat may be a publication. How far B is liable to A for the harm done in this class of cases is a subject which as far as the English cases are concerned we have treated at length in the March number of this magazine (see *supra*, p. 125). It will be seen that this question has nothing to do with libel. Lastly, B may induce C to assault A, and here also the vehicle of communication may be a letter or a printed publication. In this last case there would of course be no doubt of the liability of B. Now, where the injury from the publication falls under the first class, the libel class, outside of a statute conferring jurisdiction, the courts of equity have not restrained the publication, at least until the existence of the libelous character of the publication has been determined by a jury; but where the injury from the publication falls under the second class there is no reason why a court of equity should not restrain the publication when if published an injury would result for which there would be an action at law. There are several English and American cases in which such injunctions have been issued. These the writer hopes to discuss at a subsequent time. He now merely suggests that the case of *Throllope* v. *The London Building Trades* may be supported as belonging to this second class. It has recently been decided by the House of Lords in *Quinn* v. *Leathem* (1901), A. C. 495, that a combination to injure the plaintiff by inducing by threats of business loss a third person not to deal with him is actionable, if loss results to the plaintiff. In the case under discussion the publication of the black

list may be considered to have hurt the plaintiff firm by inducing through fear of physical violence or social ostracism, the workmen on the list to leave the plaintiff's employ. Or it may be considered as an indirect method of carrying out a plan to hurt the plaintiff workmen mentioned in the list, as it in effect contained reasons for their social ostracism by the class to which they belonged, or it may be even regarded as an invitation to many who would read to do personal violence to the plaintiff. If any of the above possible views of the facts are correct, except possibly if we consider the publication merely as an argument why others should have no dealings with them, the action of the defendants was an actionable wrong, the writing was a mere step in the prosecution of an unlawful purpose, and under the earlier English cases, there is no reason why it should not have been restrained by injunction.